

88-70

Supreme Court, U.S.

FILED

JUL 11 1988

JOSEPH F. SPANIOL, JR.
CLERK

No.

**In the
Supreme Court of the United States**

October Term, 1988

JOHN DEKLEWA, THEODORE DEKLEWA and
ROBERT DEKLEWA, d/b/a/ JOHN DEKLEWA &
SONS and/or JOHN DEKLEWA & SONS, INC.,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

CHARLES R. VOLK
Counsel of Record

JOHN A. MCCREARY, JR.
VOLK, FRANKOVITCH, ANETAKIS,
RECHT, ROBERTSON & HELLERSTEDT
Three Gateway Center
15th Floor East
Pittsburgh, PA 15222
(412) 392-2300

Counsel for Petitioners



QUESTIONS PRESENTED

1. Do this Court's decisions in *NLRB v. Iron Workers Local 103 (Higdon Construction Company)*, 434 U.S. 335 (1978) and *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983), which state that prehire agreements under §8(f) of the National Labor Relations Act, 29 U.S.C. §158(f), are voidable absent the union's attainment of majority status, preclude the National Labor Relations Board and the Third Circuit Court of Appeals from adopting a contrary interpretation?

2. May the National Labor Relations Board premise a violation of §8(a)(5) of the National Labor Relations Act, 29 U.S.C. §158(a)(5), upon an employer's unilateral repudiation of a prehire agreement permitted by §8(f) at a time when the employer has no employees covered by the 8(f) agreement?

3. Did the Court of Appeals err by enforcing the National Labor Relations Board's decision to retroactively apply its newly announced reinterpretation of §8(f) to all pending cases at whatever stage of litigation?

PARTIES TO THE PROCEEDINGS BELOW

Respondents in the proceedings before the National Labor Relations Board ("NLRB" or "Board") were John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a/ John Deklewa & Sons and/or John Deklewa and Sons, Inc. The International Association of Bridge, Structural and Ornamental Iron Workers, Local 3, AFL-CIO ("Local 3") was the charging party before the Board.

All of the parties identified above were parties to the appeal to the Third Circuit Court of Appeals. In addition, Associated General Contractors of America, Council on Labor Law Equality, and National Right to Work Legal Defense Foundation participated as amici curiae before the Third Circuit.

STATEMENT OF CORPORATE AFFILIATION

John Deklewa & Sons, Inc. is a Pennsylvania corporation, the officers and shareholders of which are partners in John Deklewa & Sons.

TABLE OF CONTENTS

	<u>Page</u>
Questions Presented	i
Parties to the Proceedings Below	ii
Statement of Corporate Affiliation	iii
Table of Authorities	v
Opinions Below	1
Jurisdiction	1
Pertinent Statutes	1
Statement of the Case	2
Argument in Support of Granting of Writ of Certiorari	6
A. The Decisions of the Board and the Court of Appeals are in Conflict with the Appli- cable Decisions of this Court	6
B. The Decisions of the NLRB and the Court of Appeals Present Important Questions of Federal Labor Law which should be Settled by this Court.	8
Conclusion	12

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>American Shipbuilding Co. v. NLRB</i> , 380 U.S. 300 (1965)	10
<i>Chevron Oil Co. v. Huson</i> , 404 U.S. 97 (1971)	11
<i>International Ass'n of Bridge, Structural and Orna- mental Iron Workers, Local 3 v. NLRB</i> , 843 F.2d 770 (3d. Cir. 1988)	passim
<i>Iron Workers Local 103 v. Higdon Construction Co.</i> , 739 F.2d 280 (7th Cir. 1984)	9
<i>Jim McNeff, Inc. v. Todd</i> , 461 U.S. 260 (1983) ...	passim
<i>John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a John Deklewa & Sons and/or John Deklewa & Sons, Inc.</i> , 282 N.L.R.B. No. 184 (1987)	passim
<i>Mesa Verde Construction Co. v. Northern California Dist. Council of Laborers</i> , 820 F.2d 1006 (9th Cir. 1987), <i>reh'g granted, prior opinion with- drawn</i> , 832 F.2d 1164 (9th Cir. 1987)	9
<i>NLRB v. Haberman Constr. Co.</i> , 641 F.2d 351 (5th Cir. 1981) (<i>en banc</i>)	9
<i>NLRB v. Iron Workers Local 103 (Higdon Construc- tion Co.)</i> , 434 U.S. 335 (1978)	passim
<i>Painters Local Union No. 164 v. Epley</i> , 764 F.2d 1509 (11th Cir. 1985), <i>cert. denied</i> , 475 U.S. 1120 (1986)	8
<i>R. J. Smith Construction Co.</i> , 191 N.L.R.B. 693 (1971), <i>enf. denied sub nom. Local 150, I.U.O.E. v. NLRB</i> , 480 F.2d 1186 (D.C. Cir. 1973)	5

	<u>Page</u>
<i>SEC v. Chenery Corp.</i> , 332 U.S. 194 (1947).....	11
<i>Trustees of Colorado State Iron Workers v. A & P Steel, Inc.</i> , 812 F.2d 1518 (10th Cir. 1987).....	8
<i>Trustees of the Nat'l Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection</i> , 680 F. Supp. 731 (D. Md. 1988).....	9
<i>Washington Area Carpenters Welfare Fund v. Overhead Door Co.</i> , 681 F.2d 1 (D.C. Cir. 1982), cert. denied, 461 U.S. 926 (1983).....	9
<i>Woelke & Romero Framing v. NLRB</i> , 456 U.S. 645 (1982)	9

STATUTES AND RULES

28 U.S.C. §1254(1)	1
28 U.S.C. §2101(c)	1
29 U.S.C. §158(a)(1)	passim
29 U.S.C. §158(a)(5)	passim
29 U.S.C. §158(b)(3)	5
29 U.S.C. §158(b)(7)(c)	7
29 U.S.C. §158(f)	passim
29 U.S.C. §159(a)	2, 10
29 U.S.C. §159(c)	5
29 U.S.C. §159(e)	5
29 U.S.C. §160(f)	5
Rule 17.1(c) Rules of the Supreme Court of the United States	6

OPINIONS BELOW

The opinion of The National Labor Relations Board in *John Deklewa, Theodore Deklewa and Robert Deklewa, d/b/a John Deklewa & Sons and/or John Deklewa & Sons, Inc.*, appears at 282 N.L.R.B. No. 184 (1987). The decision of the Third Circuit Court of Appeals enforcing the Board's order is reported *sub nom International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 3 v. National Labor Relations Board*, 843 F.2d 770 (3d Cir. 1988).

JURISDICTION

This Petition requests the Court to exercise its discretionary power of review on writ of certiorari, 28 U.S.C. §1254(1). The judgment of the Third Circuit Court of Appeals for which review is sought was entered April 12, 1988. This Petition is therefore timely. 28 U.S.C. §2101(c).

PERTINENT STATUTES

The National Labor Relations Board found Petitioners in violation of §§8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1) and (5). These violations were premised on Deklewa's unilateral repudiation of a prehire agreement authorized by §8(f) of the Act, as amended, 29 U.S.C. §158(f).

Sections 8(a)(1) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. §158(a)(1), (5) provide as follows:

- (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Section 8(f) of the Act, as amended, 29 U.S.C. §158(f) reads in pertinent part, as follows:

(f) It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members . . . because (1) the majority status of such labor organization has not been established under the provisions of section 159 of this title prior to the making of such agreement . . .

Section 9 of the Act, as amended, 29 U.S.C. §159 states in relevant part:

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .

STATEMENT OF THE CASE

The relevant facts were stipulated for submission to the Board, and appear in the Appendix at pp. 1a-14a. Stripped of formalism and briefly stated, they are:

Respondents before the Board were John Deklewa, Theodore Deklewa, Robert Deklewa, John Deklewa & Sons ("Deklewa & Sons") and John Deklewa & Sons, Inc. ("Deklewa Inc."). The individual respondents were each officers of Deklewa Inc. and partners in Deklewa & Sons.

It was stipulated before the Board that, by reason of their interrelatedness, Deklewa & Sons and Deklewa Inc. constitute a single employer within the meaning of the Act. It was further stipulated, however, that Deklewa Inc. was not incorporated as a "double breasted" operation to avoid Deklewa & Sons' collective bargaining agreement. Deklewa, Inc. was at all times material hereto engaged solely in the business of "heavy" construction, which includes construction of highways, bridges, railroads and so forth. Deklewa, Inc. was party to various 8(f) agreements with unions representing employees in the construction industry, including the Laborers District Council of Western Pennsylvania. Deklewa & Sons was, during all relevant periods, engaged exclusively in the business of construction of commercial and industrial buildings. Deklewa & Sons had, during this period, an 8(f) agreement with, *inter alia*, Local 3. Because of their different business emphases, Deklewa, Inc. and Deklewa & Sons did not compete with each other. App. p. 4a-5a.

During the course of its contractual relationship with Local 3, Deklewa & Sons never employed a permanent workforce under the Ironworker classification. App. pp. 7a. When Deklewa & Sons needed Iron Workers, they were hired from the Union's hiring hall on a project by project basis in accordance with the terms of the 8(f) agreement. From January 1, 1982 to April, 1983 Deklewa & Sons employed a total of eleven Iron Workers: three on one job, six on another, and two on a third. App. p. 100a. On other

projects Deklewa & Sons subcontracted Iron Workers jobs to a contractor also under an agreement with Local 3. App. *Id.* At the time of its repudiation of the Iron Worker agreement, Deklewa & Sons employed no Iron Workers at all and had not done so for five months. App. p. 12a.

The genesis of this dispute occurred in September, 1983 when Deklewa, Inc. began work on a heavy construction project known as the Chippewa Township Water and Sewage Treatment Authority job. Deklewa, Inc. entered into a subcontract with another employer to perform the work of setting and tying reinforcing steel. This subcontractor intended to use members of the Laborers Union to perform this work. App. p. 12a. The historic practice in Western Pennsylvania has been that Laborers perform so-called re-bar work on heavy construction projects, and Iron Workers represented by Local 3 perform re-bar work on building projects. Local 3, however, has consistently attempted to secure heavy construction re-bar work for its members since, unlike most craft unions in the area, the Iron Workers do not recognize a distinction between heavy and building construction.

On September 21, 1983, Deklewa & Sons notified Local 3 of its repudiation of the 8(f) agreement between the parties. App. pp. 11a-12a. Local 3 thereupon filed unfair labor practice charges naming Deklewa, Inc. as the employer, and alleging that Deklewa, Inc. had refused to bargain with Local 3. This charge was subsequently amended to name petitioners herein as employers. App. p. 3a. Upon issuance of a complaint by the General Counsel, the parties stipulated to the facts as summarized here and the case was transferred to the NLRB for disposition. App. pp. 1a-2a.

The Board issued its Decision and Order on February 20, 1987, using the facts of the instant case as a vehicle to announce sweeping changes to its interpretation of section 8(f) of the Act. App. pp. 50a-122a. In its decision, the Board overturned its holdings in *R. J. Smith Construction Co.*, 191 N.L.R.B. 693 (1971), *enf. denied, sub nom, Local 150, I.U.O.E. v. NLRB*, 480 F.2d 1186 (D.C. Cir. 1973), and its progeny, and held that, contrary to the position espoused in *R. J. Smith*, neither employers nor unions could unilaterally repudiate a section 8(f) agreement which was entered into voluntarily. The Board declared instead that section 8(f) agreements were enforceable through sections 8(a)(5) and 8(b)(3) of the Act, 29 U.S.C. §§158(a)(5) and (b)(3), and that section 8(f) agreements do not constitute a bar to the processing of valid petitions for representation elections filed under sections 9(c) and 9(e) of the Act, 29 U.S.C. §§159(c) and (e). The appropriate unit in which to conduct such elections normally will be the single employer's employees covered by the agreement at the particular job site. Finally, the Board ruled that upon expiration of a section 8(f) agreement, the signatory union will not enjoy a presumption of majority status, and either party may then repudiate the relationship.

Turning to its decision on the Deklewa facts, the Board found that by repudiating the 1982-1985 8(f) agreement and withdrawing recognition from Local 3 without an NLRB supervised election, petitioners violated sections 8(a)(1) and 8(a)(5) of the Act despite the fact that no Iron Workers were employed at the time of repudiation. The Board ordered petitioners to make whole any employees for losses incurred from September 21, 1983 to the expiration date of the contract. App. p. 99a. On Petition for

Review and Cross-Application for enforcement, undertaken pursuant to 29 U.S.C. §160(f), the Court of Appeals for the Third Circuit affirmed the Board's decision and order, and granted enforcement. 843 F.2d 770 (3d Cir. 1988).

ARGUMENT IN SUPPORT OF GRANTING OF WRIT OF CERTIORARI

Rule 17.1(c) of the Rules of this Court states that an important consideration for granting review on certiorari is presented:

When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Petitioners respectfully submit that both considerations addressed in Rule 17.1(c) are present in the instant case. Review by this Court on certiorari is therefore appropriate.

A. The Decisions of the Board and the Court of Appeals are in Conflict with the Applicable Decisions of This Court.

This Court has twice construed §8(f) to permit unilateral repudiation of prehire agreements at any time prior to a union's attainment of majority status. In *NLRB v. Ironworkers Local 103 (Higdon Construction Company)*, 434 U.S. 335 (1978), the Court affirmed the Board's interpretation that until such time as a union demonstrates majority status, "[t]he prehire agreement is voidable and does not have the same stature as a collective-bargaining contract entered into with a union actually representing a majority

of the employees” 434 U.S. at 341. “[A]bsent a showing that the union is the majority’s chosen instrument, the [§8(f)] contract is unenforceable.” *Id.* at 352. The *Higdon* Court endorsed the Board’s conclusion that because §8(f) confers no representational status on a union party to an 8(f) agreement, picketing to enforce such an agreement was, in reality, recognitional picketing violative of §8(b)(7)(c), 29 U.S.C. §158(b)(7)(c). *Id.* at 346.

Concededly, the *Higdon* Court affirmed a construction of §8(f) espoused by the Board. Here, both the Board and the Court of Appeals relied on the *Higdon* Court’s characterization of that construction as “acceptable” and a “defensible construction of the statute.” 434 U.S. at 341, 350. Both interpreted this language as granting the Board license to adopt the totally contrary construction at issue in the instant case. See *Local 3*, 843 F.2d at 779; *Deklewa*, App. pp. 59a, 81a n.40. The Court of Appeals rejected petitioners’ argument that this Court’s subsequent decision in *Jim McNeff, Inc. v. Todd*, 461 U.S. 260 (1983) precluded the NLRB from reinterpreting §8(f) in a manner contrary to the construction announced in *Higdon*. *Local 3*, 843 F.2d at 776.

In *McNeff*, this Court in a unanimous decision announced that an employer in the construction industry has an “undoubted right to repudiate a prehire agreement before the union attains majority support in the relevant unit.” 461 U.S. at 270. Moreover, the Court made it clear that its decision was not based on deference to a “defensible” Board interpretation of the statute, but rather on the Court’s own “fidelity to Congress’ intent that prehire agreement be voluntary—and voidable” *Id.* at 271. However, the Court of Appeals chose to rely completely on the language of *Higdon*, distinguishing *McNeff* on the basis

that *McNeff* “is not as explicit as *Higdon* in making it clear that the Supreme Court was merely reviewing the Board’s interpretation and not establishing one of its own.” 843 F.2d at 776. The Court of Appeals concluded that the NLRB’s reinterpretation was entitled to deference because “nowhere in the *McNeff* opinion does the Court hold that the statute requires §8(f) agreements to be voidable.” *Id.*

Petitioners respectfully submit that this Court, in its *McNeff* opinion, has definitively interpreted §8(f) to require that prehire agreements be voidable, and that the conclusions reached by the Board and the Court of Appeals thereby are in conflict with the applicable decisions of this Court. Supreme Court Rule 17.1(c). Accordingly, certiorari is appropriate to review the decisions of the Court of Appeals and the National Labor Relations Board at issue. At the very least, certiorari is appropriate to clarify the proper characterization of this Court’s construction of section 8(f).

B. The Decisions of the NLRB and the Court of Appeals Present Important Questions of Federal Labor Law Which Should be Settled By This Court.

Even assuming that this Court’s decision in *Higdon* and *McNeff* did not preclude the contrary decisions of the Board and the Third Circuit below, the voidability of §8(f) agreements presents an important and confused issue of federal labor law which should be settled by this Court. Prior to the Third Circuit’s decision in the instant case, every post-*Higdon* Federal Court decision to consider the issue concluded that pre-hire agreements were voidable until the union obtained majority status. *See, e.g., Trustees*

to *Colorado State Iron Workers v. A&P Steel, Inc.*, 812 F.2d 1518 (10th Cir. 1987); *Painters Local Union No. 164 v. Epley*, 764 F.2d 1509 (11th Cir. 1985), *cert. denied*, 475 U.S. 1120 (1986); *NLRB v. Haberman Constr. Co.*, 641 F.2d 351 (5th Cir. 1981) (*en banc*); *Iron Workers Local 103 v. Higdon Construction Co.*, 739 F.2d 280 (7th Cir. 1984); *Washington Area Carpenters Welfare Fund v. Overhead Door Co.*, 681 F.2d 1 (D.C. Cir. 1982) *cert. denied*, 461 U.S. 926 (1983). *See also*, *Woelke & Romero Framing v. NLRB*, 456 U.S. 645, 664 (1982) (employers who “do not have a stable work force among whom the union has secured a majority, may be free to repudiate the [8(f)] agreement.”)

Post-*Deklewa* decisions evidence uncertainty over the proper interpretation of Section 8(f). *See, e.g., Mesa Verde Construction Co. v. Northern California Dist. Council of Laborers*, 820 F.2d 1006, 1013 (9th Cir. 1987) (“The *Deklewa* decision stands in conflict with prior decisions of this court permitting an employer, absent majority support for the union in the appropriate bargaining unit, to repudiate pre-hire obligations. . . . [W]e are not permitted to overrule prior panel’s interpretations of the Act, even with the intervening NLRB case law.”), *reh’g granted, prior opinion withdrawn*, 832 F.2d 1164 (9th Cir. 1987) (argued March 16, 1988); *Trustees of the National Automatic Sprinkler Industry Pension Fund v. American Automatic Fire Protection*, 680 F. Supp. 731 (D. Md. 1988) (noting conflicting decisions). A definitive construction of §8(f) by this Court would do much to allay the uncertainty over the statute’s proper construction evidenced in the foregoing decisions.

There is an additional, compelling reason for this Court to undertake review of this case. Petitioners argued

before the Court of Appeals that the construction of 8(f) adopted by the Board is inconsistent with the statutory scheme, and therefore constituted legislation rather than interpretation. *Cf., American Shipbuilding Co., v. NLRB*, 380 U.S. 300, 318 (1965). Although the Court of Appeals did not address this argument, petitioners assert that the decision of the Board, as enforced by the Third Circuit, cannot stand in the absence of statutory support for the result therein reached.

As noted above, the NLRB found that petitioners herein had violated, *inter alia*, Section 8(a)(5) of the Act, 29 U.S.C. §158(a)(5), by repudiating the 8(f) agreement with Local 3. Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" Section 9(a) of the Act states that it is only "[r]epresentatives designated or selected by the majority of the employees" who "shall be the exclusive representatives . . . for the purposes of collective bargaining." 29 U.S.C. §159(a). By holding that §8(a)(5) is available to enforce an 8(f) agreement, the NLRB has simply ignored the plain language of 8(f), which creates an *exception* to the unfair labor practices set forth in section 8 of the Act, and permits parties to "make an agreement" even though the "majority status of [the union] has not been established . . ." 29 U.S.C. §158(f). The Board's decision further ignores this Court's emphatic statement that entry into an 8(f) agreement does not "expand the duty of an employer under §8(a)(5), which is to bargain with a *majority* representative, to require the employer to bargain with a union with which it has executed a prehire agreement but which has failed to win majority support in the covered unit." *Higdon*, 434 U.S. at 346 (emphasis in original).

Quite clearly, the decisions below present important questions of federal labor law and statutory construction which should be settled by a decision of this Court.

The final issue presented for review concerns the Board's decision to apply its *Deklewa* holding to all pending cases at whatever stage of litigation. Petitioners argued before the Court of Appeals that retroactive application of the decision was inappropriate under the standard announced in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). This argument was premised on the *Deklewa* Board's overruling of clear past precedent as announced by this Court in *McNeff*: an employer has an "undoubted right to repudiate a pre-hire agreement before the union attains majority support in the relevant unit" 461 U.S. at 270. The Board analyzed its decision on retroactivity under this Court's decision in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and the Court of Appeals deferred to this analysis. 843 F.2d at 781. Review on certiorari is appropriate to settle the proper standard for retroactive application of a Board decision announcing a sweeping reinterpretation of a well-settled construction of the Act.

CONCLUSION

For the foregoing reasons, petitioners submit that certiorari is appropriately exercised to review the instant decisions of the Board and the Court of Appeals.

Respectfully submitted,

By /s/ CHARLES R. VOLK

Charles R. Volk

Counsel of Record

JOHN A. MCCREARY, JR.

VOLK, FRANKOVITCH,

ANETAKIS, RECHT,

ROBERTSON & HELLERSTEDT

Three Gateway Center

15th Floor East

Pittsburgh, PA 15222

(412) 392-2300

Attorneys for Petitioners,

John Deklewa, Theodore

Deklewa and Robert Deklewa,

d/b/a John Deklewa & Sons

and/or John Deklewa & Sons,

Inc.

CERTIFICATION OF BAR MEMBERSHIP

The undersigned, Charles R. Volk, hereby certifies that he is a member in good standing of the bar of the Supreme Court of the United States.

/s/ CHARLES R. VOLK.....
Charles R. Volk, Esq.

CERTIFICATE OF SERVICE

I, Charles R. Volk, Esq., hereby certify that service of the foregoing Writ of Certiorari and accompanying Appendix was made on the following counsel of record by Federal Express to the Solicitor General, Lawrence Gold, Esq.; David M. Silberman, Esq.; Elliott Moore, Esq.; Patrick J. Szymanski, Esq.; and Linda Dreeben, Esq. and hand-delivered to Stanford A. Segal, Esq. all on July 11, 1988:

LAWRENCE GOLD, ESQ.

DAVID M. SILBERMAN, ESQ.

815 16th Street, N.W.

Washington, D.C. 20006

STANFORD A. SEGAL, ESQ.

1708 Law & Finance Bldg.

Pittsburgh, PA 15219

ELLIOTT MOORE, ESQ.

PATRICK J. SZYMANSKI, ESQ.

LINDA DREEBEN, ESQ.

Office of the General Counsel

National Labor Relations Board

Washington, D.C. 20370

Solicitor General

Department of Justice

Washington D.C. 20530

... /s/ CHARLES R. VOLK ...

Charles R. Volk, Esq.

